No. 2529.

In the

UNITED STATES CIRCUIT COURT of APPEALS

for the Ninth Circuit.

R. C. WOOD, *et al.*, - - - - - - - - - *Appellants,*

VERSUS

F. G. NOYES, Receiver, etc., - - - - - *Appellee.*

Brief of Appellee on Petition for Rehearing.

ORION L. RIDER,
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Attorney for Appellee.

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vs.

F. G. NOYES, Receiver, etc., - - - - - *Appellee.*

BRIEF OF APPELLEE ON PETITION FOR REHEARING.

Petitioners ask for a rehearing herein upon the following matters:

First. The effect of the Barnette trust deeds.

Second. That the lower court had no jurisdiction of the subject matter.

Third. That the complaint did not state a cause of action.

I.

The Barnette Trust Deeds.

This subject has been gone over so many times in the course of this litigation that it must have become wearisome to the court. Nothing of merit that is new has been presented. Some further fault is found as to the reasoning by which this court arrived at its final conclusion, but that conclusion has not been shaken by anything that has been said. This court has clearly and decisively stated the gist of the whole matter in the following language:

> "* * * there is nothing in the evidence to show that the deeds were accepted in accord and satisfaction of the claims of the corporation against Barnette or any of the appellants." *(Jesson* v. *Noyes*, 245 Fed. 46, 53.)

The fact that the Receiver may have entered into the possession of the property described in one of the deeds could not change the proposition that there had been no accord and satisfaction. This court has correctly in mind the nature and effect of that possession and gave it full consideration in the opinion in the case last referred to. What is there said is an answer to the present contentions of the petitioners herein in this language:

> "Again, the property was not all surrendered *absolutely* for the payment of the depositors and holders of unpaid drafts, but a portion thereof was surrendered only for the *payment of a deficit to be thereafter ascertained* as between the

amounts due depositors and owners of unpaid drafts and the amount realized by the receivers out of the property and assets of the bank. None of the proceeds of the property so surrendered by Barnette in the first deed can be applied to payment of depositors and holders of unpaid drafts until the property and assets of the bank shall have been realized on and devoted to liquidation. *There was imposed upon the receivers, by their acceptance of the conveyances, the obligation to pursue all available remedies to recover the assets, including, we think, the assets which may be recovered in the present suit.*"

II.

The Questions of Jurisdiction and Sufficiency of Facts.

It is now urged, for the first time in this case that the lower court was without jurisdiction of the subject matter of the action, and that the complaint does not state a cause of action in the Receiver. By the *first*, petitioners seek to question the authority of the lower court, exercised in the case of *Tanana Valley Railroad Company and John Zug* v. *Washington-Alaska Bank*, to appoint a Receiver in that action; and, by the *second*, they would question the capacity of appellee as such Receiver to maintain the action at bar.

Neither of these propositions has ever been presented or even hinted at before. It never before was intimated, either in the lower court or in this court, that the lower court was not acting within its jurisdiction and authority when it appointed appellee as

receiver in the *Tanana Valley Railroad Company* case. Petitioners seem to think they can resort to a different and independent form of attack each time they appear in any matter pertaining to any of these cases, always holding something up their sleeves for the future, instead of regarding an appellate court as a place to correct errors suggested to the lower tribunal, and to finally dispose of matters on a full hearing and not by piecemeal.

By the fourth subdivision of the very Statute of Alaska quoted at page 9 of their brief, the District Court did have authority and jurisdiction to appoint a Receiver "when a corporation is insolvent or is in imminent danger of insolvency." It is alleged in the complaint (Rec., pp. 8, 9, 10) that after April 12, 1910, this bank "was at all times insolvent and in a failing condition"; that the Receivers were appointed on January 5, 1911; and that on the date that the bank ceased business on January 4, 1911, the assets of the bank were then and still are insufficient to pay its liabilities in full. The insolvent corporation was doing business at Fairbanks, Alaska, and within the jurisdiction of the court making the appointment of the Receivers. Its property was also within said jurisdiction. Said court did then have jurisdiction of the subject matter. Such facts existing the appointment can not be collaterally attacked. *Shinney* v. *North Amercian etc. Co.*, 97 Fed. 9; *Gunby* v. *Armstrong*, 133 Fed. 417. So far as appears from the record in this case, the appoint-

ment of the Receivers in the *Tanana Valley Railroad Company* case, or of the substitution of the appellee herein in their stead, has never been questioned in any way by said bank or even objected to for any reason. Nor is there any contention here by these petitioners that the bank ever did make any protest about the matter. These petitioners were not parties to that suit, and can not question collaterally what was done therein. After his appointment, the Receiver was subject to the order of the court appointing him. If he acted without proper order (and it is not, and never was, contended that he did), such fact would effect only his powers and capacity to act, and not the jurisdiction of that court to appoint him.

The cases cited by petitioners on this proposition are not in point. The sole point involved in such cases was the right of an ancillary receiver, appointed in one jurisdiction, to maintain an action in a foreign jurisdiction. That is not the situation in the case at bar. Here the Receiver is suing within the jurisdiction of the court which appointed him.

Aside from the statutory authority for the appointment, above referred to, a court of equity has general power to appoint a receiver for the assets of a foreign corporation w i t h i n its jurisdiction. *Shinney* v. *North American etc. Co., supra.*

The second proposition presented by petitioners under this heading questions the right of the Receiver, appellee herein, to maintain this action. In

other words, they would question his capacity to sue. This matter was never presented to the lower court. Want of legal capacity to sue is made a ground of demurrer by the Alaska Code of Civil Procedure (Sec. 890); but no such ground was ever presented by petitioners. It is further provided by said Code as follows:

> "*Sec. 894.* If no objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action."

In *Walsh* v. *Brynes*, (Minn.) 40 N. W. 831, it was held that the claim that the complaint is insufficient because the facts establishing the jurisdiction of the court to appoint the plaintiff as receiver are not more fully stated and that his authority to bring the action does not appear, could not be raised under a general demurrer, the proper ground being that the plaintiff has not legal capacity to sue.

In *Allen* v. *Baxter*, (Wash.) 85 Pac. 26, it was held that objections to the sufficiency of the complaint which alleged that the plaintiff was appointed and qualified as receiver, and which failed to show in what case or court he was appointed receiver, could not be raised by general demurrer, although they might have been raised by proper motion.

It is respectfully submitted that the Petition for Rehearing herein should be denied.

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Attorney for Appellee.